IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5064 OF 1990

Nivritti Namdeo Thite
Age 52 years, Occ.Landlord,
R/o.241, Ganesh Peth
Pune. .. Petitioner.

Vs.

Hemraj Gulabchand Daga
Age 56 years, Occ.trade,
R/o. Room No.1, Building No.2,
Summer Society, 7
Bund Garden Road
Pune. .. Respondent.

Ms.Gauri Godse for the petitioner.
Mr.U.B.Nighot i/b Mr.D.R.More for the respondent.

CORAM : D.B.BHOSALE, J.

DATED : 15TH FEBRUARY, 2007

ORAL JUDGMENT:

. This writ petition under Article 227 of the Constitution of India is directed against the judgment and order dated 12.9.1989 rendered by the IV Additional District Judge, Pune in Civil Appeal No.761 of 1984 by which the appeal filed by the respondent-defendant was allowed and the judgment and decree passed by the trial court dated 14.6.1983 in civil suit no.2493 of 1977 was set aside. The suit was instituted by the petitioner for eviction on the ground of default.

2. The petitioner, hereinafter referred to as "the landlord", is the owner of house no.241 situated at Ganesh Peth, Pune. He had let out a shop premises on the ground floor of the said house no.241 together with front ota and three rolling shutters for commercial use (for short "the suit premises") to the respondent-tenant, hereinafter referred to as "tenant" in 1969. The monthly rent of the suit premises was Rs.60/- plus education cess of Rs.1.20 ps. per month. It was monthly tenancy. It appears that on 17.6.1972 the landlord had issued a notice to the tenant demanding a rent at the rate of Rs.100/-. That notice was replied by the tenant on 6.7.1992 (Exhibit-54). The said notice was not placed on record. It appears from the reply that the landlord had demanded arrears from 1.9.1970. A standard rent application was filed by the tenant within the statutory period and those proceedings were ultimately concluded in civil revision application no.3 of 1976 wherein the standard rent at the rate of Rs.60/- per month was fixed. It is thereafter, once again on 30th July, 1977 a noticed was issued by the landlord to the tenant (Exhibit-49) demanding arrears from 1.8.1970 to 31.8.1977. That notice was also replied by the tenant on 19.8.1977 (Exhibit-52). In the reply, he specifically stated that from time to time he had paid various amounts to the landlord, totally amounting to Rs.15,771/-, and

after deducting rent at the rate of Rs.60/- plus education cess per month, the amount of Rs.8,460/- remained in excess with the landlord and hence he was not liable to pay the rent. In the circumstances the landlord filed a suit against the tenant for eviction on the ground that he failed and neglected to make payment of the rent on 1st August, 1970. The eviction was also sought on the ground of non user, however, it was not pressed before the appeal court and this court as well. It is against this backdrop a decree under section 12(3)(a) of the Bombay Rent Act was prayed for.

3. The trial Court decreed the suit holding that the alleged payments made from time to time were not made to the landlord but most of the payments were made to his brother and father and such payment cannot be treated as valid tender of rent to the landlord. The appeal court, however, reversed the findings recorded by the trial Court and held that the payments made by the tenant to the landlord amount to valid tender of rent and even the payments made towards the telephone bills are also liable to be adjusted towards the rent. The learned Judge has accordingly allowed the appeal. Admittedly, there was no other transaction between the parties for which the tenant was liable to pay to the landlord.

4. I heard Ms.Godse, learned counsel for the petitioner-landlord for quite sometime and with her assistance went through the judgments of the courts below as also the record. The contentions of the learned counsel for the landlord were two fold. Firstly, she contended that even if it is assumed that the amounts paid by the tenant to the landlord, his father and brother from time to time, totally amounting to Rs.15,771/-, is accepted that was not liable to be adjusted towards the rent unless and until the tenant establishes that there was understanding or agreement between the parties regarding adjustment of the said amount towards rent. In support of this contention Ms.Godse, learned counsel for the landlord placed reliance upon the judgment of this court in **Pratapsingh Mohansingh Pardeshi (since deceased) through LRs Vs. Laxmikant Revachand Bhojwani and Anr. 1995(2) Mh.L.J. 579 and in Gopal Shrikisan Agrawal Vs. Vinayak Pralhad Jamkhedkar 1997 (1) Mh.L.J. 83**. Secondly, she submitted that in view of an admitted position that on receipt of the notice dated 30.7.1977 (Exhibit-49) the tenant had neither tendered the rent nor did he file application for standard rent and hence decree under section 12(3)(a) must follow. In support of this contention she placed reliance upon judgment of this

court in **Harbanslal Jagmohandas and Anr. Vs. Prabhudas Shivlal AIR 1976 Supreme Court 2005**. She invited my attention to the findings recorded by the courts below to contend that the appeal court has not appreciated the evidence on record in proper perspective and the findings recorded are perverse and deserve to be set aside. She submitted that most of the amounts allegedly paid to the landlord by the tenant were made in 1969 and, therefore, that cannot be treated as valid tender of rent for the period of default from 1.8.1970 to 31.8.1977.

5. From perusal of the reply dated 6.7.1972 (Exhibit-54) to the notice issued by the landlord on 17.6.1972, besides raising the dispute of standard rent, the tenant had stated that he was not in arrears of rent and had categorically stated that certain amounts were paid to the landlord from time to time which were agreed to be adjusted towards rent. The standard rent proceedings were concluded in 1976 in which rent of Rs.60/- was fixed by the Small Causes Court. Thereafter the notice dated 30.7.1977 (Exhibit-49) was issued demanding arrears of rent from 1.8.1970 to 31.8.1977. That notice was also replied by the tenant on 19.8.1977 (Exhibit-52), once again stating that he was not in arrears of rent and the amounts paid from time to time to the landlord were

towards the rent. In this reply the tenant gave particulars of the payments made from time to time totalling Rs.15,771/-. The landlord in paragraph 3 of the plaint made reference to the notice and reply, however, has not even remotely made any reference to the case made out by the tenant, having paid amounts from time to time, either accepting or denying the same. The tenant in the written statement once again repeated that he had made the payment from time to time, totalling Rs.15,771/-, towards rent and in view thereof claim of the landlord that he was defaulter, is false and deserves to be rejected. In the written statement the tenant gave a break up of the amount of Rs.15,771/- with dates on which the payments were made. Though the trial Court holds that most of the payments were made, as claimed by the tenant, has refused to hold that as valid tender towards rent since some of the payments were made to the father and brother of the landlord. The appeal court, however, after having considered each and every payment made by the tenant and appreciating the evidence in support thereof has held that payment of Rs.10,626/- stands proved which is liable to be adjusted towards rent. It was further held that since the payment of the amounts was more than arrears of the rent, the tenant cannot be held to be defaulter and on that ground cannot be evicted from the suit premises. Though

Ms.Godse, learned counsel for the petitioner-tenant made feeble efforts to show that the reasons/findings recorded by the appeal court for arriving at this figure are wrong, in my opinion, the findings of fact recorded by the appeal court cannot be termed as perverse and, they are based on the evidence on record. The findings of fact deserve no interference by this court in its extremely limited jurisdiction under section 100 of the Code of Civil Procedure.

6. That takes me to consider the judgment in **Pratapsingh Mohansingh Pardeshi** (supra) relied upon by Ms.Godse. In my opinion it is of no avail to the petitioner since the High Court therein was dealing with the case of tenant claiming adjustment of all the expenses incurred for repairs towards rent as contemplated under section 23 of the Bombay Rent Act. In that case it was held that deduction from the rent payable cannot exceed 1/6th of the rent as per section 23 of the Bombay Rent Act hence tenant was not justified in seeking adjustment of entire expenses incurred by him for repairs towards rent and he ought to have paid rent demanded by the landlord within statutory period and since that was not done the decree of eviction under section 12(3)(a) of the Bombay Rent Act was passed. In my opinion, this judgment is of no avail to the petitioner in view of

the peculiar facts of this case. Similar are the facts in **Gopal Shrikisan Agrawal** (supra), another judgment of this court relied upon by Ms.Godse. In that case also it was held that the courts below were not justified in holding that neither there was permission from the landlord to carry out the repairs nor there was any notice to the landlord in advance before he spent the amount. In short, the repairs were carried out by the tenant at his own risk and, therefore, the expenses incurred were not allowed to be adjusted. Relying upon this judgment Ms.Godse, learned counsel for the petitioner vehemently submitted that in the present case also there was no understanding or agreement for adjustment of the amount paid by the tenant to the landlord, his father and the brother from time to time. It will not be possible to accept the submission of Ms.Godse. Looking to the conduct of the landlord right from the stage the tenant was inducted in the suit premises in 1967, now he cannot contend that there was no agreement between the parties either oral or written for adjustment of the amounts towards rent. The landlord had not so contended either in the first notice dated 17.6.1972 or the second notice dated 30.7.1977 or in the plaint. In the circumstances this submission deserves to be rejected.

7. That takes me to consider the next submission of Ms.Godse based upon the judgment of the Supreme Court in **Harbanslal Jagmohandas** (supra). In the present appeal, the case set up by the tenant is consistent right from beginning that he had made payments of certain amounts to the petitioner with clear understanding to adjust this amount towards rent. Right from beginning the case of the tenant that he is not in arrears of rent at all and in view thereof the question of raising dispute regarding the amount of standard rent of permitted increases did not arise. Both the notices, that is, notice dated 17.6.1992 and 30.7.1977 (Exhibit-49) were replied by the tenant claiming that he had made payment from time to time to the petitioner amounting to Rs.15,771/-. In **Harbanslal Jagmohandas** (supra) the Supreme Court was considering the principal question whether on receipt of a notice from the landlord terminating the tenancy on the ground of arrears of rent dispute as to standard rent has to be raised before the expiry of the period of one month after the service of the notice. It is in this context the Supreme Court observed that in order to avoid the operation of section 12(3)(a) of the Bombay Rent Act the dispute in regard to standard rent or permitted increases must be raised at the latest before expiry of one month from the date of service of notice under section 12(2) of

the said Act and it is not enough to raise a dispute for the first time in the written statement. In the present case, the facts are totally different. The tenant has denied the right from inception that he was in arrears of rent. As a matter of fact he came with positive case that he had paid the rent from time to time and was, therefore, not in arrears at all. Even in the case referred to by the Supreme Court in that case, namely, Dhansukhlal **Chhaganlal Vs. Dalichand Virchand 1968 (3) SCR 346** the landlord had given notice demanding the arrears of rent and also terminating tenancy with effect from particular date. The notice was received, however, there was no reply to the notice as we find in the present case. It is against this backdrop the Supreme Court held that in order to avoid operation of section 12(3)(a) of the Bombay Rent Act dispute in regard to standard rent or permitted increases must be raised at the latest before the expiry of one month from the date of service of notice under section 12(2) of the Act and it is not enough to raise a dispute for the first time in the written statement. In my opinion, the judgment in **Harbanslal Jagmohandas** (supra) has no application to the facts of the present case. In the circumstances the second submission of Ms.Godse also deserves to be rejected. In my opinion the findings of fact recorded by the appellate court

cannot be termed as perverse warranting interference by this court in extremely limited jurisdiction under Article 227 of the Constitution of India. I find sufficient material on record to sustain those findings. The writ petition accordingly fails and dismissed as such.

(D.B.Bhosale, J.)